

DEPARTMENT OF INDUSTRIAL RELATIONS  
OFFICE OF THE DIRECTOR  
P.O. Box 420603  
San Francisco, CA 94142



November 23, 1998

Maarten Couwenberg  
Southern California Labor/Management  
Operating Engineers Contract Compliance  
100 East Corson Street, Suite 222  
Pasadena, CA 91103

RE: Public Works Case No: 98-005  
Goleta Amtrak Station

Dear Mr. Couwenberg:

This letter constitutes the determination of the Director of Industrial Relations regarding coverage of the above-referenced project under the California public works laws, and is made pursuant to 8 California Code of Regulations (Cal. Code. Regs.) section 16001(a). Based upon my review of the documents submitted and an analysis of the applicable law, I have determined that this project is a public work within the meaning of Labor Code section 1720(a).

Facts:

**A. The Contract between Caltrans and Amtrak**

The California Department of Transportation (Caltrans) entered into a contract with the National Railroad Passenger Corporation (Amtrak) to expand the train maintenance facilities and rebuild the Amtrak station and parking facilities in Goleta, Santa Barbara County. The work is being undertaken in connection with an agreement between Amtrak and the State to provide expanded passenger service between San Diego and Santa Barbara.

All the work is being done on real property owned by Southern Pacific. The facilities, once constructed, will be used by Amtrak, which runs passenger trains on Southern Pacific lines. The train maintenance facilities will be used for overnight maintenance of Amtrak engines and trains.

Caltrans is paying 100 per cent of the costs of both the maintenance facility work and the passenger station work, to a maximum cost of \$2,100,000. The source of the money is state bond revenue, authorized by voter approval of Proposition 116 in 1990. That Proposition, now set out in Public Utility Code section 99600 et. seq. authorized spending for infrastructure for rail transportation in numerous locations around the state.

The contract between Caltrans and Amtrak (Article 3) names Amtrak as the general contractor:

...AMTRAK shall arrange for the implementation of the PROJECT and coordination with the Southern Pacific Transportation Company... and shall act as the STATE's contractor in advancing such monies as may be necessary within the limits provided hereunder. The STATE shall reimburse Amtrak for all such monies advanced in accordance with Article 6.

The contract also includes the following provisions:

ARTICLE 6 - ALLOWABLE COSTS AND PAYMENTS

- A. All work under the agreement shall be performed by AMTRAK; forces of RAILROAD on whose property the improvement is being made; or by contractors retained by either AMTRAK or RAILROAD.
- ....
- E. STATE shall participate with AMTRAK by STATE paying all costs incurred, not to exceed \$1,300,000. [This amount was later changed to \$2.1 million, as additional work was required].

A private construction company, "IBEX," has been designated by Amtrak as a contractor for at least some of the work. A letter to the Department of Industrial Relations from Caltrans states:

Amtrak advertised and awarded the contract to IBEX. Amtrak is also providing project management, field inspection and other oversight for this project.

The contract between Caltrans and Amtrak includes several provisions indicating the extent of State control over the project:

(Within Article 3):

AMTRAK and the STATE may each designate a Project Manager to review and approve plans and specification, to monitor the work of the project, and to review and approve any issues that arise.

(Within Article 4):

Amtrak shall submit quarterly progress reports to State. The reports shall discuss progress of work relative to Project schedule, budget, including percentage completion and expenditures incurred to date.

(Within Article 10)

The State shall have access at all reasonable times to the PROJECT, including access to accounting records, change orders, invoices and other construction-related documents.

Article 15 requires Caltrans, Amtrak and subcontractors to maintain financial and other records to allow state oversight agencies to determine whether there has been compliance with Public Contract Code section 10115 and Government Code section 10532. Public Contract Code section 10115 has to do with the contracting and procurement policies of state agencies. Government Code section 10532 pertains to the expenditure of "public funds" by either the State or any local agency of the State, and the authority of the Auditor General to audit the financial records of the dispensing public agencies. \_

**B. Amtrak's legal status:**

Title 49, section 24301 of the United States Code provides:

**(a) Status - Amtrak -**

- (1) is a rail carrier under section 10102 of this title.
- (2) shall be operated and managed as a for-profit corporation; and
- (3) is not a department, agency or instrumentality of the United States Government.

Section 24301, paragraphs (g), (h), (i), (j), (k), (l) and (m) all exempt Amtrak from state laws that regulate various aspects of its operation: rates, routes, pay period laws, "employee work requirements" [the number of employees needed for various operations], taxes, and waste disposal. There is no reference within this sequence or elsewhere in Amtrak-related statutes to various State prevailing wage laws.

\* \* \* \* \*

**Positions of the parties:**

**Southern California Labor/Management Operating Engineers Contract Compliance** argues this is a public work within the meaning of section 1720(a) because state funds are being used to pay for the project.

Caltrans takes the position that "Caltrans is merely a grant funding source of Proposition 116 bond funds. Caltrans does not have a contract with IBEX Construction and thus is not paying any funds to IBEX. Amtrak is not a California public agency and therefore is not subject to the requirements that public agencies pay prevailing wages as cited in the section of the California Labor Code."

Amtrak's letter to Operating Engineers says: "Amtrak is not a public agency or awarding body within the meaning of Labor Code section 1776(b) or the other laws you reference. [We] suggest you direct your requests to the proper agency prescribed by the law."

**Legal Analysis**

Labor Code section 1720(a) defines "public works" to include "Construction, alteration ... or repair work done under contract and paid for in whole or in part out of public funds...."

"Public funds" is not defined by statute. A Department regulation, 8 California Code of Regulations section 16000 defines "public funds" to mean "state, local and/or federal monies." The revenue generated by a sale of state bonds and used to pay for a construction project is within the definition of "public funds." Thus, the construction work here fits the definition of a "public work" because it is being done under contract and is being paid for in whole or in part by public funds.

Proposition 116, Public Utility Code section 99600 et. seq., is silent on application of the state's prevailing wage laws to projects undertaken with funds generated by the sale of bonds authorized by Proposition 116. The law does not either require or preclude payment of prevailing wages on such construction projects.

Other legal issues to consider are the following: (1) Is it significant for this coverage determination that Caltrans does not have a direct contract with IBEX? (2) Does Amtrak's status preclude application of California prevailing wage laws? (3) Can the use of State funds for the project be considered a grant, as Caltrans contends?

(1) The absence of a contract between Caltrans and IBEX does not stand in the way of a finding that the project is a public work.

Caltrans is an awarding body with respect to this project, as it is for many other public works. Amtrak is the general contractor, and IBEX is its subcontractor. Labor Code section 1722.1 includes subcontractors within the definition of "contractor." Thus, the absence of a contract between Caltrans and IBEX does not preclude a conclusion that the project at issue is a "public work" within the meaning of Labor Code section 1720(a).

In Rancho Cucamonga Redevelopment Agency (Mission Tortilla Plant) (P.W. Dec. No. 94-020, June 22, 1995) the Director held that section 1720(a)'s definition of a "public work" does not require that a public agency be a party to the actual construction contract or any contract. The important element is that the construction be done under contract, and paid for in whole or in part by public funds.<sup>1</sup>

(2) There are no provisions of the federal law applicable to Amtrak that would prevent application of California prevailing wage laws.

There is no provision of federal law that specifically exempts Amtrak from state prevailing wage laws. Nor is there any provision of federal law that would exempt Amtrak from state employment law regulation generally. The existence of a series of statutory provisions that exempt Amtrak from certain state regulatory laws carries the implication that Congress intended that Amtrak, which is not a federal government agency, shall be subject to other state regulatory laws. This would include, presumably, prevailing wage laws, and minimum wage laws. In support of this inference, note that in the contract with Caltrans, Amtrak agrees that it and all its contractors and subcontractors are subject to the state's employment discrimination laws, to

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<sup>1</sup> The same approach was taken in a number of other coverage decisions, including Tustin Fire Station PW Coverage Determination Appeal No. 93-054 (July 1, 1994) and Wal-Mart Shopping Center, City of Lake Elsinore, PW Dec. No. 93-012 (July 1, 1994). A similar issue was raised in Southern California Regional Rail Authority Lease of Union Pacific Right of Way (Nov. 30, 1993). There, the awarding body argued that the project should not be considered a public work because the awarding body did not itself control the project. The coverage determination concluded that it is not necessary for the awarding body to directly control a project for that project to be a public work within the meaning of section 1720(a), although other public works provisions, among them section 1720(c) and 1720.2 do include provisions of that kind.

certain provisions of the California Code of Regulations (concerning building construction), and to other laws concerning financial audits and procurement of materials.

**(3) The agreement between Caltrans and Amtrak cannot be considered a grant, contrary to the Caltrans contention.**

The Department's regulations exclude from the definition of public funds money which is transferred from a public agency to another entity by means of a loan. This exclusion is found in a note following the definition of "public funds". The regulations do not exclude from the definition of public funds money that is transferred by means of a "grant." However, a lengthy series of Department decisions exclude from the definition of "public works" projects that are built by private entities with government "grants." "Grant" is not defined by statute or Department regulation.

Proposition 116, beginning with Public Utility Code section 99620, refers to the allocation of funds to the various construction projects as "grants." "Money from the fund shall be allocated as grants by the commission pursuant to section 99621 to 99651 inclusive...."

However, in Southern California Regional Rail Authority Lease of Union Pacific Right of Way, the Director rejected the contention that the contract in that instance amounted to a grant. The decision cited a standard dictionary definition which defined a "grant" as a gift.

The word "grant" is not used anywhere in the Amtrak-Caltrans contract for the Goleta Amtrak station project. Here, the agreement to spend state money is clearly not a gift: it is to be delivered, incrementally, for completion of a railroad station and maintenance facility which will benefit the people of the state. The contract is clearly one in which the two parties make promises to each other, and after a series of "whereas" clauses, the contract says, "Now, therefore, in consideration of the mutual covenants herein contained, the parties hereto agree as follows:" As noted above, Caltrans has the right to appoint a project manager, and receives periodic reports about the progress of the work. All of this suggests that this is a commercial contract between a public agency and a private enterprise, and is not a grant. This conclusion is consistent with the Director's determination in Southern California Regional Rail Authority determination. That determination includes

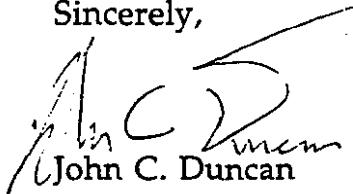
the following:

The funds expended here are paid out with a very specific purpose in exchange for specific benefits to SCRRA. Clearly, this type of arrangement is not a grant of funds, it is a contract for construction paid for with public funds.

**Conclusion:**

The work currently being performed at the Amtrak station in Goleta is being performed under contract, and is being paid for, in whole or in part, by public funds paid by the California Department of Transportation, a State agency. Thus, the project is a "public work" within the meaning of Labor Code section 1720(a). Neither Caltrans' contention that the contract amounts to a grant, nor any of the other legal issues considered above, calls for a different conclusion. I therefore find that the project is a public work within the meaning of Labor Code section 1720(a).

Sincerely,



John C. Duncan  
Director

cc: Jose Millan, Labor Commissioner-DLSE  
Dorothy Vuksich, Chief-DLSR  
Diana Marshal, Chief-DAS  
Vanessa Holton, Assistant Chief Counsel-DIR  
Patrick Merrill- Caltrans  
Johnny M. Johnson - Amtrak